



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2012/0146

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50389909
Dated: 25 June 2012**

Appellant: John Fairbairn
First Respondent: The Information Commissioner
Second Respondent: HM Revenue and Customs

On the papers

Date of decision: 23 January 2013

**Before
CHRIS RYAN
(Judge)
and
JACQUELINE BLAKE
ROSALIND TATAM**

Subject matter: Law enforcement s.31

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed, other than in respect of the small amount of information identified in the Confidential Annex to this Decision. That information should be disclosed to the Appellant. The Decision Notice date 25 June 2012 is substituted by the following notice:

SUBSTITUTED DECISION NOTICE

Public Authority: Her Majesty's Revenue & Customs
Address: 100, Parliament Street, London, SW1A 2BQ

Complainant: Mr John Fairbairn
Address: 145 Albert Rd, Southsea, Hampshire, PO4 0JW

The Decision Notice dated 25 June 2012 shall stand save that the Public Authority is directed to disclose to the Complainant, within 35 days, the information identified in the Confidential Annex to the Decision of the First-tier Tribunal, Information Rights, dated 23 January 2013.

REASONS FOR DECISION

1. Her Majesty's Revenue & Customs ("HMRC") publishes information and guidance designed to assist those potentially liable to pay VAT. One of those publications is guidance intended principally for HMRC's own staff – "General Principles of VAT group treatment – V1-28 Volume 2", which we will refer to simply as "the Guidance". However, certain passages of the Guidance have been redacted from the published version.
2. On 15 June 2011 the Appellant wrote to HMRC asking for the redacted passages to be disclosed to him. The letter constituted a request for information under the Freedom of Information Act 2000 ("FOIA").
3. FOIA section 1 imposes on public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then

disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

“in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

4. On 12 July 2011 the HMRC responded refusing the request, relying on the qualified exemption provided by FOIA section 31(1)(d). This provides that information is exempt if its disclosure *“would, or would be likely to, prejudicethe assessment or collection of any tax or duty ...”*
5. Following a complaint by the Appellant to the Information Commissioner as to the way HMRC handled his request the Information Commissioner investigated the matter and issued a decision notice on 25 June 2012 in which he decided that the exemption was engaged and that the public interest in favour of maintaining the exemption outweighed the public interest in disclosure of the information. He viewed the redacted information and satisfied himself that its disclosure could be used by opportunistic individuals to arrange their affairs to evade their VAT liability or at least provide arguments that might assist them to do so. On that basis he was satisfied that the exemption was engaged and proceeded to consider the public interest balance under FOIA section 2(2)(b). He assessed the public interest in disclosing information that might promote transparency, accountability and understanding of VAT registration and how HMRC approaches investigations and balanced it against the public interest in the law being properly enforced and tax being collected as efficiently as possible. His conclusion was that the public interest in maintaining the exemption outweighed the public interest in disclosure because disclosure into the public domain of the redacted information would be highly likely to assist those individuals inclined to fabricate their situation and therefore make the task of collecting tax more difficult.
6. The Appellant appealed to this Tribunal by filing a Notice of Appeal on 12 July 2012. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
7. In his Notice of Appeal the Appellant relied principally on the coming into force of the Corporation Tax Act 2010 (Factors Determining Substantial Commercial Interdependence) Order 2011, which he said appeared to disclose the same information as he had requested. The

Information Commissioner applied to have the appeal struck out because, he argued, it had no reasonable prospect of success because of its reliance on that Statutory Instrument. By an order issued by the President of the General Regulatory Chamber, Judge Warren, the Information Commissioner's argument regarding the Statutory Instrument was accepted, but the application to strike out was refused on the basis that the public interest balance should still be dealt with by the Tribunal. Directions were accordingly given for the appeal to be determined on the papers, without a hearing, and for the preparation of a bundle of papers (including a closed bundle of the information in dispute).

8. By further order dated 13 September 2012 Judge Warren directed that HMRC be made a party to the appeal, as Second Respondent. HMRC was also permitted by Judge Warren to submit a witness statement by a senior member of its VAT Process Owner Team, in both open and closed format. The witness was Ms V A Wilkinson and her open Witness Statement consisted mainly of an explanation of the VAT registration scheme and an enumeration of the public interest factors that she considered weighed in favour of withholding the information in dispute. On the second of those issues her evidence supported HMRC's written submission, which stressed the importance of collecting the correct amount of tax in order to provide the Government with the revenue required for public spending and the danger that, if the information in dispute were to be disclosed, those taxpayers inclined to fabricate the structure of their business so as to avoid the payment of VAT would be assisted.
9. The Appellant submitted written submissions, which focused very substantially on an investigation of certain businesses with which he is concerned. He clearly considers that it was mis-handled by HMRC and he expressed concern that the information in dispute was being withheld in order to assist HMRC in pressurising taxpayers into paying more than they were strictly required to do, or to undermine the ability of taxpayers to counter such pressure. He argued that the majority of honest taxpayers should not be prejudiced by the withholding of information that might assist the small minority who seek to avoid their liabilities.
10. We have reviewed the information in dispute with some care. For the most part we accept the HMRC arguments as to the degree to which its tax collecting efforts would be prejudiced if it were to be made public and, while acknowledging that there is a public interest in the public being informed about the assessment and collection of tax, we are satisfied that this does not equal the public interest in maintaining the exemption, not least because HMRC already publishes a great deal of information and guidance. However, in a few instances we believe that HMRC has gone too far with the process of redacting information. Instead of limiting itself, for example, to an explanation of the type of technique that tax evaders may adopt, or outlining the lines of enquiry

that HMRC may pursue in particular circumstances, it has redacted general statements that we believe may be disclosed without causing the harm that HMRC has outlined. We have explained which passages we believe should not be redacted in the confidential annex to this decision, which includes our explanation for disagreeing with the Information Commissioner's decision in each case. The annex is to remain confidential until either the time for the HMRC to appeal this decision has expired or, in the event that an appeal is filed by any of the parties, the appeal has been decided, withdrawn or otherwise disposed of.

11. Our unanimous conclusion is that, save for the few elements of information identified in the confidential annex as having been wrongly redacted, the HMRC was entitled to refuse the Appellant's request for information.

Chris Ryan
Tribunal Judge

Dated: 23 January 2013

CONFIDENTIAL ANNEX

To the decision of the First-tier Tribunal (Information Rights) in appeal

EA/2012/0146

John Fairbairn v the Information Commissioner and HMRC

Section No	Information to be disclosed	Reason
59.1	First two paragraphs (“In some cases...to...be entitled to.”)	The two paragraphs simply outline broad principles as an introduction to the typical scenarios, of which HMRC officers should be aware. Those scenarios and the rest of the section were correctly redacted.
71.9	Note located at the end of the section	The paragraph simply states what the law provides and gives a contact location for further guidance in the event of uncertainty. It is not possible to see what assistance this would provide to a reluctant tax payer.
80.1	First two paragraphs (“These notes ...[to]...at the time”)	These introductory paragraphs simply outline the law, explain that certain questions (properly redacted) should be put to the taxpayer and stress the self-evident need not to pre-publish details of the line of questioning.
90	90.1 – 90.4 (first sentence) inclusive (“The debt should be...[to]...retain the paperwork.”)	These paragraphs simply describe the process by which a VAT debt is calculated and the procedure for its recovery. It provides no assistance to the taxpayer beyond explaining part of the collection process, which ought to be available publicly.